14-cv-123-JHP-PJC

14-cv-509-JHP-PJC

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

FILED

FEB 0 5 2015

Clerk, U.S. District & Bankruptcy Courts for the District of Columbia

IN RE: ENDANGERED SPECIES ACT SECTION 4 DEADLINE LITIGATION

MDL No. 2165

10-MC-377

TRANSFER ORDER

Before the Panel:[*] Before us are both a motion to transfer and two motions to vacate a conditional transfer order. First, defendants[1] in the Northern District of Oklahoma *State of Oklahoma* action, listed on Schedule A, move under 28 U.S.C. § 1407(c) to transfer this action to MDL No. 2165 and separate and remand one claim to the Northern District of Oklahoma. The *State of Oklahoma* plaintiffs[2] oppose transfer of any claims to MDL No. 2165. MDL No. 2165 plaintiffs WildEarth Guardians (WildEarth) and the Center for Biological Diversity (CBD) support transfer of all claims to MDL No. 2165 and therefore oppose separation and remand.

We previously vacated conditional transfer of the *State of Oklahoma* action because a motion for transfer to the District of District of Columbia under Section 1404 was pending. *See* Order Vacating Conditional Transfer Order (*State of Oklahoma*), MDL No. 2165 (J.P.M.L. Aug. 11, 2014). We noted that our decision was without prejudice to the filing of a motion for transfer if the Section 1404 motion were denied, which it has been. *See id.* at 2.

---

[*] Judge Lewis A. Kaplan and Judge Ellen Segal Huvelle took no part in the decision of this matter.

[1] United States Department of the Interior (DOI); S.M.R. Jewell, in her official capacity as Secretary of the Interior; the United States Fish and Wildlife Service (FWS); Daniel Ashe, in his official capacity as FWS's Director; Gary Frazer, in his official capacity as FWS's Assistant Director for Endangered Species; and Jontie Aldrich, in his official capacity as Acting Field Supervisor of FWS's Oklahoma Ecological Services Field Office.

[2] Domestic Energy Producers Alliance; Oklahoma Farm Bureau, Inc.; the New Mexico Department of Game and Fish; and the states of Nebraska, Oklahoma, Kansas, and North Dakota.

Second, (1) WildEarth and CBD and (2) plaintiffs[3] in the Northern District of Oklahoma *Hutchison* action, listed on Schedule A, move under Panel Rule 7.1 to vacate in part the Panel's order conditionally transferring certain claims in *Hutchison* to MDL No. 2165. WildEarth and CBD seek transfer of all claims to MDL No. 2165, while plaintiffs wish all claims to proceed in the Northern District of Oklahoma. Defendants oppose both motions and seek transfer of *Hutchison* to MDL No. 2165, with separation and remand of claims as specified in our conditional transfer order.

After considering the argument of counsel, we find that these actions involve common questions of fact with the actions previously transferred to MDL No. 2165, and that transfer in their entirety under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. The actions in MDL No. 2165 involve factual questions arising out of petitions WildEarth and CBD filed before the FWS to have defendants list many species as threatened or endangered pursuant to the Endangered Species Act (ESA). *See In re: Endangered Species Act Section 4 Deadline Litig.*, 716 F. Supp. 2d 1369, 1369 (J.P.M.L. 2010). Because the agency has a single, limited budget for ESA listing activities, the FWS argued that it was unable to timely issue all of the required findings for the unusually large number of species involved in the actions filed by plaintiffs. We found that all actions would involve common questions of fact regarding the FWS's nationwide listing budget, priorities, and workload. *See id.*

WildEarth and CBD reached settlements with the FWS in 2011 that set forth a schedule for the FWS to issue listing decisions. The transferee judge will continue to oversee implementation of the settlements through fiscal year 2017. *See In re: Endangered Species Act Section 4 Deadline Litig.*, Order Granting Joint Motion for Approval of Settlement Agreement and Order of Dismissal of WildEarth Guardians' Claims, Case No. 1:10-mc-00377 (D.D.C. Sept. 9, 2011); *In re: Endangered Species Act Section 4 Deadline Litig.*, Order Granting Joint Motion for Approval of Settlement Agreement and Order of Dismissal of Center for Biological Diversity's Claims, Case No. 1:10-mc-00377 (D.D.C. Sept. 9, 2011). Under the settlement agreements, the FWS has agreed to issue proposed listing rules or "not warranted" findings[4] for more than 250 candidate species no later than the end of fiscal year 2017. As for the six species at issue in the actions now before the Panel, the FWS committed either to make a "not warranted" finding or issue a proposed listing rule by the following dates: (1) September 30, 2012 (lesser prairie-chicken); (2) September 30, 2013 (northern long eared bat); (3) September 30, 2015 (greater sage grouse); and (4) September 30, 2016 (rabbitsfoot mussel, sprague's pipit, and Arkansas darter), subject to modification. There since has been a listing decision on the lesser prairie-chicken and rabbitsfoot mussel, with the lesser prairie-chicken being listed as "threatened." One of the settlement agreements provides for CBD to file up to a certain designated number of additional ESA deadline litigation cases each fiscal year while the settlement is in effect, until 2017.

---

[3] Brad and Andrea Hutchison; New Mexico Cattle Growers' Association; New Mexico Wool Growers, Inc.; New Mexico Federal Lands Council; Southwest Quay Soil and Water Conservation District; Arch Hurley Conservancy District; Quay County Farm and Livestock Bureau; Curry County, New Mexico; Quay County, New Mexico; De Baca Soil and Water Conservation; District; De Baca County, New Mexico; New Mexico Roosevelt Soil and Water Conservation District; Central Curry Soil and Water Conservation District; Border Soil and Water Conservation District; Coalition of Renewable Energy Landowners Associations; Lea Soil and Water Conservation District; Harding County, New Mexico; Union County, New Mexico; and Northeastern Soil and Water Conservation District.

[4] Under the ESA, within twelve months after receiving a petition to list a species as threatened or endangered, the FWS must find that (1) the listing is not warranted; (2) the listing is warranted; or (3) the listing is warranted, but listing the species is precluded by pending proposals for other species ("warranted but precluded").

Plaintiffs in *State of Oklahoma* and *Hutchison* claim that, by entering into the settlement agreements, "the FWS has attempted to circumvent the legislative and regulatory process and make fundamental changes to its ESA-imposed obligations." Plaintiffs allege they have been injured by the FWS's implementation of the settlement provisions, particularly with respect to the six aforementioned species in *State of Oklahoma* and the lesser prairie-chicken in *Hutchison*. Specifically, plaintiffs allege that by committing to list a species as threatened or endangered or to issue a "not warranted" finding, the settlement agreements have eliminated the "warranted but precluded" option and, therefore, have violated the ESA and the Administrative Procedures Act.

In opposing transfer of these claims challenging the settlement agreements, plaintiffs argue primarily that (1) MDL No. 2165 was resolved by settlement in 2011, while *State of Oklahoma* and *Hutchison* are in their infancy; (2) defendants' arguments for transfer were previously denied by the Panel and by the Northern District of Oklahoma in connection with their Section 1404 motion to transfer *State of Oklahoma*; (3) these actions do not share questions of fact with MDL No. 2165; and (4) the risk of rulings inconsistent with the settlement agreements is not an appropriate justification for transfer.

We are not convinced by these arguments. These actions directly implicate the MDL No. 2165 settlement agreements, and therefore will share questions of fact with actions in the MDL. *See* Order Vacating Conditional Transfer Order (*Xerces Society*), at 1, MDL No. 2165 (J.P.M.L. Apr. 2, 2014) ("all actions to date in MDL No. 2165 have involved one of two plaintiffs or have stemmed from the MDL No. 2165 settlements involving those plaintiffs"). Indeed, several claims in *State of Oklahoma* and *Hutchison* are similar to claims brought by plaintiffs seeking to intervene in MDL No. 2165 and to challenge the settlement agreements. *See Safari Club Int'l v. Salazar*, 704 F.3d 972 (D.C. Cir. 2013), *reh'g en banc denied* (Apr. 29, 2013). As plaintiffs aim to modify the implementation of the settlement agreements, these actions necessarily will involve questions of fact as to the FWS's nationwide listing budget, priorities, and workload, the very questions also involved in the MDL actions. Since the transferee judge will oversee implementation of the settlement agreements through fiscal year 2017, we are not persuaded that this MDL has reached the point that transfer of these related actions would not benefit from inclusion. We do not find dispositive that the Northern District of Oklahoma previously denied defendants' motion to transfer *State of Oklahoma* under Section 1404. *See In re: Radioshack Corp. "ERISA" Litig.*, 528 F. Supp. 2d 1348, 1349 (J.P.M.L. 2007) ("Factors in a denial of Section 1404(a) transfer are different from the criteria for Section 1407 centralization.").

Plaintiffs argue that the risk of inconsistent rulings is an inappropriate justification for transfer because the Panel should not consider what law the transferee court might apply. But in these cases, we find consideration of that risk particularly appropriate. We do so not because we are certain how the transferee judge will rule, but rather because a finding in favor of plaintiffs will require the transferee judge to modify the settlement agreements over which he still has jurisdiction—a process that would be far more efficient if all parties to these actions are before the same court.

The parties disagree as to whether the Panel should separate and remand claims regarding the merits of the FWS's decision to list the lesser prairie-chicken as "threatened." Plaintiffs and the MDL No. 2165 plaintiffs argue the claims are "intertwined," while defendants argue they are factually distinct. There is some disagreement over which claims implicate just the settlement agreements and which the merits of the listing decision, leading us to conclude that it is unclear how closely "intertwined" these claims are and whether separation and remand is warranted. We conclude, therefore, that the transferee judge is in the best position to determine which claims implicate only the merits of the listing decision and whether remand of those claims is appropriate. If the transferee judge determines that remand of any claims is appropriate, procedures are available whereby this may be accomplished with a minimum of delay. *See In re: NFL Players' Concussion Injury Litig.*, 842 F. Supp. 2d 1378, 1379 (J.P.M.L. 2012).

IT IS THEREFORE ORDERED that the actions listed on Schedule A are transferred to the District of District of Columbia and, with the consent of that court, assigned to the Honorable Emmet G. Sullivan for inclusion in the coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION

Sarah Vance

Sarah S. Vance
Chair

Marjorie O. Rendell
R. David Proctor
Charles R. Breyer
Catherine D. Perry

IN RE: ENDANGERED SPECIES ACT SECTION 4 DEADLINE LITIGATION MDL No. 2165

SCHEDULE A

Northern District of Oklahoma

THE STATE OF OKLAHOMA, ET AL. v. DEPARTMENT OF THE INTERIOR, ET AL., C.A. No. 4:14-00123

HUTCHISON, ET AL. v. DEPARTMENT OF INTERIOR, ET AL., N.D. OKLAHOMA, C.A. No. 4:14-00509

UNITED STATES DISTRICT & BANKRUPTCY COURTS DISTRICT OF COLUMBIA

ECF DOCUMENT

I hereby attest and certify that this is a printed copy of a document which was electronically filed with the United States District and Bankruptcy Courts for the District of Columbia.

ANGELA D. CAESAR, CLERK

Transfer of MDL Case
Tiffany Gough to: CM-ECFIntake_OKND 02/06/2015 12:09 PM
Cc: Tiffany Gough

From: Tiffany Gough/DCD/DC/USCOURTS
To: CM-ECFIntake_OKND@oknd.uscourts.gov
Cc: Tiffany Gough/DCD/DC/USCOURTS@USCOURTS

Dear Clerk of Court

Re: MDL 2165 - IN RE: ENDANGERED SPECIES ACT SECTION 4 DEADLINE LITIGATION

Transfer of Civil Cases

THE STATE OF OKLAHOMA, et al. v. DEPARTMENT OF THE INTERIOR, et al., CA No. 4:14-123 - Oklahoma

HUTCHISON, et al. v. DEPARTMENT OF INTERIOR, et al, CA No. 4:14-509- Oklahoma

Attached is a certified copy of a Transfer Order of the Judicial Panel on Multidistrict Litigation filed on 2/5/15, directing the transfer of the above referenced civil action(s) to the District of Columbia pursuant to 28 U.S.C. § 1407. The Honorable Judge Emmet G. Sullivan is presiding over this litigation.

When the case(s) have been closed in your District please follow these procedures:

1. Initiate the civil case transfer functionality in CM/ECF: **Extract Civil Case**
2. When prompted to select the Court choose **DISTRICT OF COLUMBIA**
3. In Remarks, please indicate that this is a MDL Case No. 2165 - Misc. 10-377 EGS

> **Please Note**: After completing this process the NEF screen will display the following message: Sending e-mail to InterdistrictTransfer_ DCD@dcd.uscourts.gov. If the message is not displayed we have not received notice.

We will initiate the procedure to retrieve the transferred cases(s) upon receipt of the e-mail.

10-mc-377cert.pdf

If you have any questions, please call or email me at 202-354-3064 or Tiffany_Gough@dcd.uscourts.gov.

Thanks,
Tiffany